No. 2768

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CRANE CO., a Corporation
Appellant

vs.

FIDELITY TRUST COMPANY, Trustee, a Corporation, and WASHINGTON-OREGON CORPORATION, INDEPENDENT ELECTRIC COMPANY, a Corporation, and WILLIS D. HOAG,
Appellees

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

Reply Brief of Appellant

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SCHWAB PRINTING COMPANY

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FACTS RESTATED.

It should not be necessary to allude to the facts again, but there are some statements made by counsel that are erroneous, and I cannot permit them to go unchallenged. On page 4 of the brief the statement is made that in some instances it was agreed between the intervenor and the Washington-Oregon

Corporation that the payments made should be applied on specific items. There is positively nothing in the record that would justify such a statement. On pages 6-8, counsel's brief, the word *"betterment"* is used quite indiscriminately and generally in this form, "a betterment made necessary, etc." If it were made necessary, it should be classed under the head of essential repairs and equipment and not "betterments." Betterments, as the term is used, means permanent improvements that are not necessary to the business of the corporation. The statement is made that it is not known whether some of the materials were used at all. Evidently counsel has not read the stipulation of facts. It is stipulated that *all* of these goods became a part of the property covered by the appellee's mortgage. At the bottom of page 7 the statement is made that Exhibit A-4 was used in the connection with the S., P. & S. extension. The stipulation proves that statement an error. Counsel is also in error in making the statement that Exhibit A-8 was used on new or old mains. I do not deem it necessary to go through counsel's statement of facts and review each item. It would perhaps be the best and most satisfactory method for the court to ignore the statement of both parties as to the nature of the materials and resort to the stipulation, where it will be found that they are fully described and characterized. All of the goods for which we are claiming, it will be noted, were used, counsel's statement to the contrary notwithstanding. (Stipulation, Sec-

tion XIII, Tran., 56.) All of the goods furnished, as disclosed by Exhibits B-1 to B-18, inclusive, were used for the purposes set forth in my original brief. I have rechecked these items, and can give no better explanation than will be found under the second subdivision of my original argument. The classification submitted by the appellee is his interpretation of the stipulation. In giving my classification I used as near as possible the language of the stipulation, and will submit to the court the final interpretation.

Before reviewing the cases I desire to call the court's attention to a statement made on page 10 of the appellee's brief to the effect that they would show by authorities submitted that service connections were extensions and not subject to preference. I fail to find that they have in any way verified this statement.

ARGUMENT ANSWERED.

Before replying to the argument of counsel, and in order to set the court right in the event it has been misled by the unverified statements of counsel, let me summarize the situation presented in this case. That there may be no misunderstanding or misconception of the basis upon which Crane Co. rests its claim, I will briefly restate what is here admitted to be the concurrent facts:

1. There was a diversion of the current income prior to the receivership in an amount exceeding Crane Co.'s claim. (Trans., 57.)

2. At the time of the receivership there was in the hands of the Washington-Oregon Corporation sufficient moneys arising from the net income to have paid Crane Co.'s claim in full. *This fund went into the hands of the receiver.*

3. There was a sufficient net income arising from the receivership to have paid Crane Co.'s claim in full. (Trans., 79.)

4. The materials furnished by Crane Co. went into and formed a part of the properties covered by the mortgage. (Trans., 56.)

5. The materials furnished were necessary to the making repairs and such additional equipment as was necessary to meet the conditions precedent to the renewing and enjoyment of the franchises under which the corporation operated.

6. The materials furnished by Crane Co. increased the value of the mortgaged security. This is not denied.

7. The materials furnished were necessary to conserve the properties covered by the mortgage. (See Stipulation of Facts and Exhibits.)

8. The materials furnished were necessary to the conduct of the business of the corporation, which is the rule announced and adhered to by this court in the case of *Moore v. Donahoo.*

9. The materials were sold by Crane Co. in the reliance that they would be paid for out of the current income of the corporation. (Trans., 55.)

The above propositions are not only abundantly established by the stipulations, exhibits and plead-

ings, but are virtually admitted by the appellee, and were so found by the trial court. To further clarify the situation, let me again restate the theory of allowance as stated by this court in the case of *Moore v. Donahoo*:

> "Such equity as he may have flows from the fact that in the ordinary course of business he has performed labor and furnished necessary supplies to the railroad company with the reasonable expectation of being paid therefor from certain funds. * * * The real basis upon which the preference rests is thought to be the implied understanding on the part of all parties that such debts are to be paid out of the current income before the mortgagee has any claim thereto."

Furthermore, it must not be forgotten that the current income has been held by this court and by the Supreme Court to be a trust fund for the benefit of just such creditors as Crane Co. (Cases cited in Appellant's Brief, page 32.) Therefore, if the cases cited by appellee are to govern, the facts should be somewhat similar, at least. Otherwise they must fall in the class designated by counsel as "dictum" and "general statements."

There is no proposition, I take it, that can be properly demonstrated by dealing separately with its component parts. In other words, you cannot take a case that has considered the question of diversion alone, or a case that has considered the question of classification alone, or a case that has

considered the question of time alone, and offer them separately to prove a result of the union of the three. Therefore, unless, as I said before, we can find a case that has in it a combination of facts similar to those hereinbefore stated, the opinion cannot furnish a criterion for the decision here.

I will review the cases which he has cited for the purpose of showing the court the utter inapplicability. The case of *Kneeland v. American Loan Co.*, 136 U. S. 96, it appears, is one of the pivotal cases cited by counsel, and they seem to repose great confidence in the comments of the court, in spite of the fact that just prior thereto we find them admonishing this court against the acceptance of the doctrine announced in *Fosdick v. Schall,* because of it being mere *obiter dictum.* Upon an inspection of the *Kneeland* case, we find that there was no diversion and no surplus earnings; that this swayed the court in its final conclusion is indicated at the beginning of the opinion by the use of the following language:

> *"It is important to note these facts*: First, *this case is not embarrassed by any matter of surplus earnings.* * * * Second, *the receivership was at the instance of a judgment creditor.* * * * *It was not at the instance of the mortgagees nor were they seeking a foreclosure.* Third, the rolling stock for which preference was asked *was not included in the sale, but was returned* to the intervenor upon the order entered prior to the sale."

The court did use the language quoted by counsel after stating the above facts. All of these facts which did not exist in the *Kneeland* case exist here, and the plain intimation is that had such facts existed the court's conclusion would have been otherwise.

The case of *Thomas v. Western Car Co.,* 149 U. S. 96, is another case cited by counsel and is a favorite of those seeking to defeat preferential claims. Let us see what the facts were there. (1) The claim was for car rentals under a conditional contract of sale, whereby title remained in the car company; (2) the court found that the cars were not furnished in reliance that the rentals would be paid out of the current income. That was obvious from the fact that they were sold on a title retaining contract, wherein the payments were designated as rentals; (3) the officers of the intervenor and the defendant corporation were practically the same; this was the first point considered by the court; in fact, it was the decisive feature; (4) there was no diversion and no surplus net income, either before or during the receivership. Time and time again have mortgagees sought to show that the *Thomas* and *Kneeland* cases repudiated the doctrine of *Fosdick v. Schall,* but each time the Supreme Court has stated emphatically that the doctrine announced in *Fosdick v. Schall* is still adhered to. (See *Vir. & Ala. Coal Co. v. Ry. Co.,* 170 U. S. 355.) As far as this case is concerned, the portions quoted in counsel's brief from the decision

are *dictum* of the clearest kind. That the case is absurdly inapplicable is apparent.

Counsel refers to the case of *Virginia & Alabama Coal Co. v. Ry.,* 170 U. S. 355, as endorsing the *intimations* contained in *Kneeland* and *Thomas* cases. With all due deference to counsel, this case does not in any way approve either the *Kneeland* or *Thomas* case. They do not disapprove it, as there was no cause for doing so, the facts being entirely different. This case, however, is most favorable to appellant's contention, and I respectfully urge the court to read it. Here it will be noted that a receiver was appointed on *March 4, 1892.* A claim was made for coal which had been furnished a year or more previous to this time for operating locomotives. It also was shown that a portion of the coal was used during the receivership. *The claim was allowed out of the income of the receivership.*

As counsel takes occasion to refer to betterments quite frequently, it might be well to call the court's attention to what the Supreme Court has defined as betterments. In the *Miltenberger Case,* 106 U. S. 286, five miles of road was constructed. This was considered necessary to facilitate the conduct of the business. It was an extension within the interpretation of appellee, yet the court allowed the claim notwithstanding. If in that case a preference would be allowed for five miles of new railroad, where the other equities were not nearly as strong as exist in this case, how can this court

avoid allowing a preference for water mains laid under precisely the same conditions?

In *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 462, the court defines betterments as follows:

> "Materials could not be considered betterments where * * * the improvements made by the receiver no more than made up for the deterioration of the road, especially in view of its imperfect construction and inferior material from the beginning."

In this case ties, new rails, turntables, foundation, bridges and fences were held under the above definition not to be betterments. I cannot see the distinction between this class of material and the materials furnished by Crane Co., and I submit that counsel has not pointed out the difference in his argument.

It seems unnecessary to answer the comments on the case of *Moore v. Donahoo,* 217 Fed. Rep. 177, yet I hesitate to allow the statement to the effect that this court approved the six months' rule to go uncontradicted. The court did refer to the preferential claim period, but what was clearly intended by that reference was the preferential period adopted by the referee, which, in that particular case, was six months. It is to be noted, however. that six months included practically all of the claims. The former holding of this court in the case of *N. Y. Guaranty & Indemnity Co. v. Tacoma Ry. & Motor Co.* was not in any way disturbed, and

it is clear in that case that the six months' rule was not applied, although the question of time was directly in issue.

Inasmuch as the appellee impresses upon the court the applicability of the case of *Ill. Trust & Sav. Bank v. Doud,* 105 Fed. Rep. 149, it would be well to give some attention to the facts in that case. In the first place, we find that the intervenor made a loan to the company on the agreement and understanding that it would not be paid out of the income until after the improvements had been paid for out of the current income. The improvement had not been paid for at the time of the receivership. Hence, according to the understanding between the parties, he was not entitled to payment. *There was furthermore no diversion of the current income shown. Neither was there a surplus on hand.* Furthermore, this case was decided upon the theory that in order to permit a preference, a showing should be made that the goods furnished were necessary to keep the road a going concern. This theory has not been approved in later cases, and is specifically repudiated by this court in *Moore v. Donahoo,* the proper query being, "were the goods necessary to the business of the road?" The learned judge in the *Doud* case did review many decisions of the federal courts, but the deductions drawn from those cases I submit are not warranted by the facts. In any event, the conclusion of the *Doud* case is predicated upon a wholly different state of facts. It was found, furthermore, in the *Doud* case that the money

loaned was to build an extension not necessary to the business of the road. In fact, it was to engage in an entirely new enterprise. Neither was the money loaned on the understanding that it would be paid out of the current income.

The statement is further made by counsel that this case refused to apply the doctrine of preference, on the theory that the goods were necessary to maintain the franchise. How any such a conclusion can be reached by a reading of the opinion is beyond my comprehension, as it holds nothing of the kind. Counsel takes occasion, in commenting upon this case, to refer to the holding in *Fosdick v. Schall,* and particularly to that portion quoted in my original brief as *dictum.* The *Doud* case is the only case that I am able to find where the holding of the Supreme Court is denominated *dictum.* Evidently the Supreme Court does not so consider it, because in the later case of *Burnham v. Bowen,* 111 U. S. 776, we find the court using this language:

> "We do not now hold, any more than we did in *Fosdick v. Schall,* * * * that the income of a railroad in the hands of a receiver for the benefit of the mortgage creditors can be taken away from them and used to pay the general creditors of the road. *All we then decided,* and all we now decide is, that if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable with the restoration of the fund which was improperly applied to other use."

Here we have the Supreme Court literally explaining and interpreting what they had previously decided. This should silence all remarks on the question of *dictum* as referring to the case of *Fosdick v. Schall.* But to go still further and take the quotation from the *Doud* case, appearing on pages 25 and 26 of counsel's brief, I assert that Crane Co. can qualify under that holding. Counsel seems to think that the *Doud* case held that the fact that the materials furnished aided to conserve and improve the property and increase the security was immaterial. Again I assert that the case holds nothing of the kind. I admit that that fact in itself would not be sufficient, but that it is important in connection with other facts is established beyond question by the authorities. (See *R. I. Locomotive Works, et al., v. Trust Co.,* 108 Fed. Rep. 5, hereinafter reviewed.)

The case of *Rodger Ballast Car Co. v. R. R. Co.,* 154 Fed. Rep. 629, another opinion by Judge Sandborn, is clearly not in point, for the following reasons:

1. No diversion was shown and no surplus income. It was a question of payment out of the *corpus* of the estate.

2. The holding did not go any further than to say that the claim was not entitled to preference *out of the corpus.*

3. The court clearly found that the ballast cars were not necessary to the business of the road, and in that particular I believe the court was right.

True, the railway commission had insisted upon them fixing up their road. Ballasting the road might have been necessary, but to expend a large amount of capital for ballast cars for the purpose of doing the ballasting was not necessary to the business of the road. If you consider the holding in the light of the facts, it is not antagonistic to the position taken by *Crane Co.*

The case of *State Trust Co. v. Kansas City,* 129 Fed. Rep. 455, was another case decided in the same circuit in which Judge Sandborn was sitting. One of the first things considered was whether the filing of the mechanic's lien was not a waiver of a right of intervention. While the point is not clearly decided, yet, according to other opinions by the Supreme Court and other courts, a filing of a mechanic's lien is a clear waiver of the equitable right of intervention. (Foster's Federal Practice, Vol. I, page 970.) Furthermore, the bill of intervention was not filed until after the decree had been rendered, and the decree specifically provided that no claims would be allowed that had not accrued within one year. In the order allowing the intervenor to file his petition he was subjected to this portion of the decree. His claim accrued more than eighteen months prior to the receivership.

The case of *Rhode Island Locomotive Co. v. Continental Tr. Co.,* 108 Fed. Rep. 5, a case reviewed by counsel, is authority for the proposition that the fact that the materials increased the value of the security should be taken into consideration in de-

termining the preference. To use the court's language:

> *"The fact that the materials augmented the security held by the mortgagees is an element to be considered in determining preference."*

The facts in this case are so clearly distinguishable from the facts in the present case that it could not furnish authority for a decision here even if the opinion held as counsel states, but it does not so hold. One of the first points considered by the court and which was especially reported by the referee was the fact *that there had been no diversion and no surplus income.* Furthermore, the locomotives were not sold in reliance that they would be paid for out of the current income. That this was an important feature considered by the court is indicated by the language of the opinion, as follows:

> "If the appellant is to obtain any relief, it must show, first, that the demand here prosecuted was not a debt created upon the personal credit of the company; * * * second, *that there are current earnings now applicable to such debts of income,* or that there had been a diversion of the current earnings either before or since the receivership which the mortgagees should equitably release."

The court, of course, found against the intervenor. The decision clearly intimates, however, that had the facts been otherwise, the preference would have been allowed. I might add that all of the facts which did not exist in that case are ad-

mitted here. Therefore, on the holding of this case a preference should be granted. The court did not hold, as counsel say, that the locomotives were an addition to the equipment and not a current operating charge. It held that the locomotives were an addition of permanent equipment, and that there *was no showing that they were necessary to the business of the road.*

In the case of *Lackawanna Ry. Co. v. Farmers' Loan & Trust Co.,* 176 U. S. 306, the first point considered by the court and found by the master was that there had been no diversion of the current income and no surplus income applicable. Furthermore, the intervenor had collateral security for his claim, thus clearly showing that he did not rely upon payment out of the current income. It will further be noted that in this case the time within which the claim accrued was sufficient to take in the whole claim of intervenor here, *yet that point was not referred to as a reason for denying the claim.*

The case of *Central Trust Co. v. Colorado Co.,* 200 Fed. Rep. 85, is distinguishable in the following particulars:

1. The case was decided upon a question of pleading. The intervenor based his petition upon an oral contract between himself and the defendant company, whereas the proof showed a written contract between the defendant company and the Parker Boiler Co., for which intervenor acted as

agent. The court, therefore, held that the cause of action was not in intervenor.

2. There was no diversion shown, and that point was specifically mentioned as follows:

> "There is nothing alleged or proven showing as against the bond holders any equity in claimant, *as, for instance, that during the progress of the repairs or thereafter there was any diversion of the net income.*"

This case, therefore, holds that a diversion or the surplus net income creates an equity in favor of the claimant. Again I am at a loss to understand how counsel can put forth the case of *City Trust Co. v. Sedalia,* 195 Fed. Rep. 845, as supporting his contention. An excerpt from the opinion at the outset clearly shows that the position taken by the court was in no way antagonistic to the position of the intervenor here. To quote:

> "Unless such demands are based upon some statute of the state in force at the date of the making of the mortgage creating a prior right in the claimant, *or in case of necessary materials furnished which became a part of and directly enhanced the value of the mortgaged property itself in such sense as to render the sale of the mortgaged property, including the materials furnished, for the benefit of the security holders without payment for the materials so supplied, inequitable.*"

The facts held in this case to be necessary to the allowance of a preference existed here, namely:

There was a diversion, and the materials furnished became a part of and directly enhanced the value of the mortgage security. I find in this case support for my contention that the fact that the materials conserved the security is an important element in determining preference. One of the claims here allowed was in favor of the surety company that had become surety on a supersedeas bond on an appeal from a judgment rendered against the defendant, on the theory of the *Morrison* case. The court said:

> "Surely this was such an act of protection of the security pledged to the payment of the bonds arising in operation of the property as in equity requires the casualty company to be paid in preference to the holders of the mortgage debt."

There can be no doubting this language. It is clear and convincing, and inasmuch as it is one of counsel's own cases, it should be immune from the suspicion of *dictum*. And in this connection I will again comment on the *Morrison* case. By referring to the opinion in the *Morrison* case, it will be seen that the court denominated the equity of the intervenor a strong one, yet its only strength laid in the fact that the act done by Morrison conserved the assets of the corporation, which inured to the benefit of the mortgage bondholders.

The case of *Central Trust Co. v. Colorado Co.*, 200 Fed. Rep. 85, was submitted as proving that a claim for furnishing and installing boilers was

disallowed on account of classification. While that is true, yet the situation presented as a reason for the declination shows the utter inapplicability of the opinion. The boiler was a part of the *original construction.* It had never been used in the business and was held by the court not to be necessary in the business. Furthermore, the petition was held to be insufficient, and a variance existed between the proof and the contract set out. This was the first and major reason for disallowing the claim.

The case of *Toledo Ry. v. Hamilton,* 134 U. S. 290, was where a dock was constructed. This dock was new and had not been used in the conduct of the road, neither was it essential to its business. I am not contesting with counsel the question as to whether or not *original construction* will form the basis of a preferred claim. This case and the following case of *Porter v. Pittsburg, etc., Steel Co.,* 120 U. S. 649, are cited as proving that it is immaterial that the work done tended to conserve the railroad or enhance the property. What these cases in fact decided is that this fact *in itself* will not furnish grounds for preference, especially where the other equities are against the intervenor.

The case of *Reyburn v. Consumers' G. L. & F. Co.,* 29 Fed. Rep. 561, would seem to me to need no comment. The gas meters for which preference was asked were part of the original construction of the company. The company had never been in operation prior to the furnishing of these meters. Under such a state of facts, there is no question that a

preference would not lie. That this was the decisive feature is indicated by the following language:

> "They are all for construction material, such as meters, pipes and other material, which was used in the construction of the works, and *not in their operation after they were constructed.*"

Counsel states that the *Reyburn* case is on all fours with the case at bar, especially with reference to the connections, pipes and fittings. That this statement is error is apparent. All of the goods furnished by Crane Co. was after the construction had been completed and during the operation of the company. The *Reyburn* case, furthermore, is authority for the proposition that the doctrine of preference will be applied to other than railway companies.

In the subdivision V of counsel's brief he attemps to interpret the stipulation on the question of diversion. I am impressed with the fact that counsel could not have read this stipulation carefully, otherwise he could not have so misconceived its import. This stipulation not only states that a diversion actually took place, but that there are and were sufficient funds on hand to have paid Crane Co. I cannot concur in the statement that diversion implies something wrong. It is possible for one to get possession of another's property without committing any wrong. It is in the retention and refusal to give it up that constitutes the inequity. On page 44 of the brief counsel again misstates my

position. I am not contending and have not contended that any one feature would enable us to have a preference. It is the concurrence of all of that that establishes the preference. Counsel on page 45 makes the statement that there were general creditors to the amount of $50,000. This statement is absolutely *dehors* the record, and it is unfair, as I am in no position to concur in or refute the statement. The stipulation eliminates such a statement, and had this been true, and as important as counsel seems now to consider it, he surely would have added it to the stipulation. Were I desirous of going outside of the record, I would add in addition that a settlement was made with all of the other creditors. But we are trying this case on the facts presented in the record, to which I will confine myself strictly and ask that counsel be compelled to do likewise.

The case of *Westinghouse v. K. C. Southern,* 137 Fed. Rep. 26, is another case of Judge Sandborn, and is wholly inapplicable, because of the difference in the facts. It is clear that Judge Sandborn has in the opinions circumscribed the limits of intervening creditors more than any other court, and it is for that reason that in reviewing cases counsel hesitated to depart very far from that circuit. The comment of counsel on the case of *N. Y. Guaranty & Indemnity Co. v. Tacoma Ry. Co.,* 83 Fed. Rep. 367, to the effect that the time within which the claim accrued was less than a year, is inaccurate The rule which counsel has been attempting to

apply is the date when the goods were furnished. If you are to take the time of accrual of debt rather than the date the goods were furnished, then I submit that the date of accrual of Crane Co.'s claim was on the date the account was stated between them, on June 1, 1914. There is no evidence that the amount for which we are now claiming was due prior to that time. But by examining this case it will be noticed that the court does not put any such construction upon it as counsel would have the court believe.

The case of *Bowen* (*Bound*) *v. Railway Co.,* 58 Fed. Rep. 473, was not decided on the question of time at all. The decisive feature was that the intervenor did not look to the current earning for payment. Furthermore, no diversion occurred. Interest was paid, but it was with the knowledge and consent of the intervenor. In other words, the intervenor waived his claim and permitted the interest to be paid. True, time was mentioned, but not until after the court had refused the claim on other grounds.

Counsel makes the statement that the six months' rule was applied in the case of *Thomas v. Peoria Ry. Co.,* 36 Fed. Rep. 819. The six months' rule was not applied in a case anywhere analogous to the present situation. No diversion was shown in that case. The court, furthermore, gives as its reason for applying the six months' rule was that it found support in the statutes of Illinois. If, as it appears in that case, the laws of Illinois were a

decisive factor by analogy, the case of *Bellingham Bay Imp. Co. v. Fairhaven, etc.,* 49 Pac. Rep. 514, should be decisive here. Furthermore, in the above case the court stated with emphasis that the intervenor was not entitled to any equitable consideration, because the stockholders and officers of the intervenor company were practically the same as the railway company, and that the contract upon which the preference was based was an unconscionable one and an imposition upon the stockholders.

The case of *Thomas v. Cincinnati,* 91 Fed. Rep. 795, is submitted as having applied the six months' rule against labor claims. To begin with, the case does not so decide. There was no diversion shown, but was decided upon the fact that the intervenors were not in court with clean hands and were not entitled to ~~or any surplus income~~. ~~Furthermore, the case was~~ any equitable consideration. An excerpt from the opinion will suffice to show this:

> "The claims in question were presented at the suggestion of the auditor of the receiver by the receiver's counsel, with the approval of the court."

It was shown further that the real parties in interest were not the intervenors at all. In fact, the real owners were perhaps deceased. This was the decisive point. To have allowed a claim under such circumstances would have been inequitable and would have prostituted any court of equity. Counsel refers to the case of *Finance Co. v. Charleston R. R.,* 52 Fed. Rep. 678, and quote in italics a

portion to the effect that the courts have expressly refused to recognize claims less than six months prior to the appointment of the receiver (Appellee's Brief, page 54). The appellee has disqualified this case by his own admission that the courts have applied more than a six months' rule. But when we inquire into the facts of this case we find that the claim was for an attorney fee for work done in the legislature to try to pass a law to validate bond which had already been invalidated by the courts. Furthermore, at the time these services were rendered there was no road in existence. How could such a claim qualify under any of the rules of equitable preference? It would seem to me that if the intervenor could even get by a demurrer on such a claim as this, that in itself would furnish a precedent for allowing the Crane Co.'s claim in full.

In the case of *National Bank of Augusta v. Carolina R. R. Co.,* 63 Fed. Rep. 25, quoted for the purpose of substantiating the six months' rule, it will be found that no diversion was shown. Furthermore, the claimant was the president of the road, who had in charge its full management and was responsible in a large measure for its insolvency. The case was not decided on the question of time, but on the question that under such circumstances the president was not entitled to any priority. Notwithstanding the statement of counsel, no question of time was considered in the case of *International Trust Co. v. Townsend Brick Co.,* 95 Fed. Rep. 850,

a claim was disallowed on the theory that it did not form operating expense or maintenance.

Counsel quotes at length from the case of *Central Trust Co. v. East Tennessee R. Co.,* 80 Fed. Rep. 624 (Appellee's Brief, page 56), prefacing the quotation by stating that the court was considering the application of the six months' rule where it was shown that the net earnings had been diverted to the payment of interest on mortgage debts and improvements. I do not find that this case presented any such question; in fact, no diversion was shown, and this was one of the first points considered. To use the court's language, "The question as to whether there had been a diversion * * * was principally one of fact, and was referred to a special commissioner who reported *that there had been no such diversion.*" We find, furthermore, in the opinion the court held that while there was no established six months' rule, that the six months' rule had generally been applied in that circuit. But the court clearly indicated that if the circumstances were different and the equities of the complainant plain, a six months' rule would not be applied. There was no showing furthermore that the materials were necessary to the business of the road.

In the case of *State Trust Co. v. Kansas City Ry., supra,* which is also offered to establish a six months' rule, the court uses language which clearly rejudiates counsel's statement, when applied to this case. The facts as I have heretofore shown are so utterly different, that even had the case so held,

it could not control here. But the case actually holds in substance that there is no rigid six months' rule, and that the equities of the particular case control the time.

The case of *The Title Insurance Co. v. Home Telephone Co.,* 200 Fed. Rep. 263, does not decide what counsel claims for it, and is so outside of the issues here presented that I will not even take the time to review it.

Counsel conclude their examination of the authorities covering the question of time with the statement that the overwhelming authority is to the effect that a claim will not be extended over the six months' period. If the authorities are so overwhelming and the cases so numerous, it is quite strange that counsel do not at least examine one case in point. I have reviewed all of the decisions commented upon by counsel and wherever the facts approach the facts presented in this case, the court has inferentially sustained my position. A case to be an authority must decide the proposition involved on a state of facts that would at least include the point in controversy. If, as appears in many of the cases cited by counsel, the intervenor fails to bring himself within the well-known equitable rules and procedure, a court of equity will always find some way to deny relief. If, on the other hand, as appears here, where the claimant has shown himself in every way entitled to equity, and where the mortgagee has placed itself in a position where it has sought equity without even the pretense of

doing or offering to do equity, the court should compel it to do that which is its clear equitable duty.

The position taken by counsel, that if the court is to allow this claim,

> "We are therefore brought to the astonishing conclusion that the position of the unsecured creditors is superior to that of the secured creditors,"

is narrow and illogical. If they are sincere in that statement it is because, for some reason or other, they are unable to comprehend the theory upon which preferential claims are allowed or the necessity of conforming to equitable maxims when asking equitable relief. They further fail to take into consideration the fact, as held by the decisions, that when accepting the security the mortgagee impliedly agrees that the creditors shall be paid out of the income. In summing up the equities, counsel absolutely ignore practically all of the vital elements necessary to preference. If no diversion had taken place, and if there were not at the time the receiver took charge of the properties current net income sufficient to have paid Crane Co.'s claim, and which went into the hands of the receiver, or if the bondholders, outside of the fact that they came into possession of money that should have been used to pay our claim, had not actually profited by what Crane Co. furnished, and had the materials Crane Co. furnished not actually gone into the mortgaged property, there might have been some cause for com-

plaint. Counsel says the bondholders have suffered a loss on their investment. There is no suggestion of that kind anywhere in the record. On the contrary, if you will compare the value of the property with the bonds outstanding, they were paid in full. Had they not been paid in full, that fact would have been stipulated in the record, as counsel was very acute in not overlooking any facts that would help their cause. In any event, the bondholders are responsible largely to Crane Co. for what they received. Counsel have extreme difficulty in keeping in mind the fact that the mortgage creditors are actually in possession of money which should have been devoted to the payment of our claim, and which is more than sufficient to pay it. Paying back money that never belonged to you cannot be called a loss. If I were to find another's pocket-book and subsequently be compelled to relinquish it or to pay back the money contained in it, would I be justified in calling that a loss? My inability to retain it might be a misfortune, but I could not regard it as a loss.

As I have previously stated, counsel take up separately the propositions necessary to constitute a preferential claim, and after determining that neither one separately is sufficient to justify a preference, conclude that the existence of all concurrently would not be sufficient. If that is not an example of a *non sequitur,* then I am much mistaken in my judgment. Neither hydrogen or oxygen constitute water, yet the union of hydrogen and

oxygen constitutes water. In taking up these several propositions the court will observe, by reference to my brief, that I attempted to show, and I believe I have shown, that all of the essential features exist in this case. As my purpose has been in this brief to answer merely the argument and citations of counsel, I do not care to weary the court by repetition. It has been my object to present the facts in the case and the law applicable in such a way that the equities of appellant would become apparent. That each case to a large measure must be decided upon its own peculiar equities, is a point upon which we must agree. Feeling, as I do, that the appellee and the mortgage creditors have greatly benefited by the materials furnished, and that they have taken into their hands money which should have been devoted toward the payment of this claim, I am firm in my conviction that the prayer of the intervenor should be granted.

Respectfully submitted,

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Solicitor for Appellant.